BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KELLEY L. HOULTON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,353
DILLON COMPANIES, INC.	)	
Self-Insured Respondent	)	

ORDER

Respondent appeals the October 22, 2009, preliminary hearing Order of Administrative Law Judge John D. Clark (ALJ). Claimant was awarded benefits in the form of temporary total disability compensation (TTD) and ongoing medical treatment for an injury alleged to have occurred on August 23, 2009, after the ALJ found that claimant had suffered an accidental injury which arose out of and in the course of her employment with respondent.

Claimant appeared by her attorney, Joseph Seiwert of Wichita, Kansas. Respondent appeared by its attorney, Edward D. Heath, Jr., of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held October 22, 2009, with attachments; and the documents filed of record in this matter.

ISSUE

Did claimant meet with personal injury by accident which arose out of and in the course of her employment with respondent? Respondent argues the evidence, both from claimant's actions and the medical reports generated contemporaneous with the alleged injury, contradicts claimant's allegations of a work-related injury. Claimant argues that same evidence provides support for her allegations of an injury while claimant was doing heavy lifting while working as meat cutter for respondent.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant had worked for respondent as a meat cutter for about five years. This job required that she lift weights from 85 to 95 pounds on a regular basis and up to 125 pounds several times per day. Claimant testified at the preliminary hearing that she experienced pain in her left hip and problems walking on August 23, 2009. She may have mentioned this to her co-workers, none of whom were identified. Claimant finished her entire shift for respondent on that date. She then went home, where she experienced severe hip pain on the left side. Claimant acknowledges that she did not give notice of this injury to her supervisor on the 23rd. Claimant was scheduled to work on August 24, but called in to respondent and advised that she had to take her daughter to the Crisis Intervention Center for Sedgwick County. Claimant did not mention her pain during this conversation. On the 25th, claimant took two of her children to the Wichita Clinic to be treated for strep throat.

Claimant testified that she told Wes Casey, respondent's assistant store manager, of the injury and ongoing pain complaints on either the 25th or 26th of August. Claimant was scheduled to work on August 26, and called Mr. Casey that morning to advise him that she was in pain and was going to the doctor. Mr. Casey denies talking to claimant on the 25th about any injury, but acknowledges that claimant called him the morning of the 26th about going to the doctor. However, he denies that claimant told him the pain was work related during that phone call. He agrees that when claimant called him later that day, after the doctor's appointment, she mentioned the pain may be work related. Claimant requested that Mr. Casey fill out an accident report, which he did on August 27.

Claimant first sought medical treatment for her back pain on August 26, 2009, with Rosalie R. Focken, M.D., her family physician. Claimant advised Dr. Focken that she had left hip pain and back pain since Sunday, with no known injury. The history contained in the August 26, 2009, office note discusses problems with claimant's back in 2004. The office note states:

> The patient was last seen by me in 2004 and she had back pain at that time too. The patient did not do this at work as far as she knows."[1]

The office note also states that claimant noticed hip pain when she tried to rise out of a chair that day. This occurred at claimant's home after her shift with respondent.

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[1] P.H. Trans., Cl. Ex 1.

When claimant advised respondent of the possibility of a work injury, she was referred to Via Christi Occupational & Environmental Medicine (Via Christi), where she was examined by Benjamin R. Norman, M.D. Claimant was diagnosed with lumbar strain and given work restrictions, which respondent was unable to accommodate. Claimant advised Via Christi on September 2, 2009, that on Sunday, August 23, when she went to work, she was fine. But, by the time she went home that afternoon, she was having difficulty waking.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

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[2] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 2008 Supp. 44-501(a).

[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

Respondent disputes claimant's allegations of a work-related injury, arguing that claimant would have advised respondent of the severe pain in her hip and back on either August 23, 24 or 25, 2009. Additionally, the medical reports generated contemporaneous to the alleged injury appear to contain contradictions regarding how and when the pain began. The fact claimant did not complain on the 23rd is understandable as she was able to finish her shift and go home. On the 24th, claimant was involved in a family crisis, needing to take her daughter to the Crisis Intervention Center. And on the 25th, claimant needed to take two of her children to the doctor for strep throat. This appears to have been a fairly hectic time in claimant's life. Her failure to discuss the back pain and hip pain is somewhat understandable. The quote that claimant's injury did not happen at work as far as she knows could possibly apply either to the 2004 back complaints or to the current injuries. The record is not clear on this point. While there are questions in this record regarding claimant's allegations, this Board Member finds that claimant has satisfied her burden of proving by the barest of margins that she suffered an accidental injury which arose out of and in the course of her employment with respondent on August 23, 2009. The above questions can be answered when the parties depose the various health care providers prior to the final award.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied her burden of proving that she suffered an accidental injury which arose out of and in the course of her employment with respondent.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated October 22, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[6] K.S.A. 44-534a.

Dated this ____ day of January, 2010.

HONORABLE GARY M. KORTE

c: Joseph Seiwert, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent
John D. Clark, Administrative Law Judge